1969

Florentino Lovato v. Beatrice Foods, Dba Utah By-Products Company : Brief of Defendant And Respondent

In the Supreme Court of the State of Utah

FLORENTINO LOVATO,
Plaintiff and Appellant,
vs.
BEATRICE FOODS, DBA UTAH BY-PRODUCTS COMPANY,
Defendant and Respondent.

Case No. 11453

BRIEF OF DEFENDANT AND RESPONDENT

Appeal from Judgment of the District Court of Weber County, Utah, The Honorable Charles G. Cowley, Judge.

WORSLEY, SNOW & CHRISTENSEN
Seventh Floor
Continental Bank Building
Salt Lake City, Utah
Attorneys for Defendant and Respondent

LOWE, VINCENTI & SHARP
1101-1109 First Security Bank Bldg.
Ogden, Utah
Attorneys for Plaintiff and Appellant

TABLE OF CONTENTS

	Page
NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT	
POINT I. DEFENDANT IS A PROPERLY QUALIFIED INSURER UNDER THE UTAH WORKMEN'S COMPENSATION ACT AND PLAINTIFF'S CIVIL COURT ACTION RELATIVE TO HIS INDUSTRIAL INJURY IS BARRED BY THE PROVISIONS OF SECTION 35-1-60 OF THE ACT	5
CONCLUSION	13

CASES CITED

Spring Canyon Coal Company v. Industrial Commission of Uah, 74 Utah 103, 277 P. 206 (1929) 9

STATUTES CITED

Section 35-1-46, U.C.A. 1953 ..... 3, 7, 11, 12, 14

Section 35-1-47, U.C.A. 1953 4

Section 35-1-53, U.C.A. 1953 3

Section 35-1-57, U.C.A. 1953 ..... 4, 10, 11, 12, 13, 14

Section 35-1-60, U.C.A. 1953 ..... 4, 5

TEXTS CITED

58 Am. Jr., "Workmen's Compensation," §2 13

In the Supreme Court of the State of Utah

FLORENTINO LOVATO,
Plaintiff and Appellant,
vs.
BEATRICE FOODS, DBA UTAH BY-PRODUCTS COMPANY,
Defendant and Respondent.

Case No. 11453

BRIEF OF DEFENDANT AND RESPONDENT

NATURE OF THE CASE

This is an action brought by an employee against his employer to recover damages for a personal injury sustained during the course of his employment.

DISPOSITION IN LOWER COURT

The Defendant's Motion for Summary Judgment was granted and Plaintiff's motion to strike certain defenses raised in Defendant's Answer was denied.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the lower court's Summary Judgment granted in favor of Defendant and of its denial of Plaintiff's Motion To Strike.

STATEMENT OF FACTS

Defendant disputes the major portion of the Statement of Facts contained in Plaintiff's written brief filed herein on appeal since it is predominantly in the nature of an argument and the purported facts therein stated are not supported by the record. Defendant therefore restates the facts as supported by the record.

Defendant is and for the past several years has been a business operating in the State of Utah. Pursuant to Defendant's application, the Industrial Commission of Utah issued Defendant a certificate dated January 26, 1963, certifying that Defendant was qualified as a self-insurer under the Utah Workmen's Compensation Act as of February 28, 1963, and pursuant to Defendant's subsequent application dated February 17, 1966, the Industrial Commission of Utah included Utah By-Products Company with Beatrice Foods Company as a self-insurer under the Act as of February 28, 1966. From then until the present time, the defendant, Beatrice Foods dba Utah By-Products Company, has been considered on the records of the Industrial Commission of Utah as a self-insurer under the Utah Workmen's Compensation Act. Defendant's certification as a self-insurer has never been revoked nor questioned by the Industrial Commission. (D. 4 — Affidavit of Virginia Leahy)

Since Defendant's certification by the Industrial Commission as a self-insurer and for several years prior

thereto, the Industrial Commission has neither required nor requested that self-insurer companies furnish annual proof of financial ability to pay direct compensation. It has apparently instead relied upon the records of the Industrial Commission relative to claims made and paid and the annual reports and payment of self-insurers' tax submitted to the Utah Tax Commission.

In addition to having been certified as a self-insurer by the Industrial Commission, Defendant has fully complied with the provisions of Section 35-1-53, Utah Code Annotated, 1953 by filing annual payroll reports and paying annually to the Tax Commission the special tax imposed upon self-insurers. (D. 4 — Affidavit of Ray Jorgensen) Also on or about September 8, 1968, the Industrial Commission sent to all self-insurer companies in Utah a request for a financial statement and defendant responded by filing its financial statement with the Commission on September 12, 1968.

On October 1, 1968, Plaintiff served Defendant with a Summons and Complaint filed in the District Court of Weber County wherein he states that on June 14, 1968, Plaintiff severed his left thumb at the first joint while operating a machine during the course of his employment with Defendant, and he alleges that his injury was caused by the negligence of Defendant. He further alleges that Defendant had failed to comply with Sections 35-1-46

& 35-1-47 of the Workmen's Compensation Act relative to the securing of compensation payments by either obtaining compensation insurance coverage or by qualifying as a self-insurer and that he is therefore entitled, pursuant to Section 35-1-57, Utah Code Annotated, 1953, to maintain a civil court action for his injury. Defendant filed its Answer to Plaintiff's Complaint wherein it denied negligence on its part, asserted the defenses of contributory negligence and assumption of risk and further asserted that Plaintiff's civil court action for damages from his injury is barred by Section 35-1-60 Utah Code Annotated 1953 which provides that Plaintiff's exclusive remedy for his injury is the compensation provided for in the Utah Workmen's Compensation Act. (D. 3) Then on October 15, 1968, Defendant filed its Motion for Summary Judgment supported by the Affidavits of Virginia Leahy and Ray Jorgensen relative to Defendant's status and qualification as a self-insurer. Plaintiff responded by filing its Motion to Strike the third, fourth, and fifth defenses raised in Defendant's Answer and on November 4, 1968 Defendant's Motion for Summary Judgment and Plaintiff"s Motion to Strike were heard together before Judge Charles G. Cowley. Judge Cowley took the motions under advisement and thereafter by Order dated November 12, 1968, he granted defendant's Motion for Summary Judgment and denied Plaintiff's Motion to Strike. (D. 8)

ARGUMENT

POINT I

DEFENDANT IS A PROPERLY QUALIFIED INSURER UNDER THE UTAH WORKMEN'S COMPENSATION ACT AND PLAINTIFF'S CIVIL COURT ACTION RELATIVE TO HIS INDUSTRIAL INJURY IS BARRED BY THE PROVISIONS OF SECTION 35-1-60 OF THE ACT.

The record clearly shows that Defendant is a duly qualified self-insurer under the provisions of the Utah Workmen's Compensation Act and under the Rules and Regulations of the Industrial Commission of Utah. It is therefore entitled to the benefits of the Act which provides that an employee's exclusive remedy for recovery of personal injury damages sustained as a result of an industrial injury is the compensation provided for by the Act. Section 35-1-60, Utah Code Annotated, 1953, provides:

> "The right to recover compensation pursuant to provisions of this title for injuries sustained by an employee whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this

> act shall be in place of any and all other civil liability whatsoever, common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer agent or employee of the employer based upon any accident, injury or death of an employee."

This action is an attempt by Plaintiff to circumvent the Workmen's Compensation Act by alleging that Defendant is not qualified as a self-insurer under the Act. Such an allegation is contrary to and unsupported by the evidence. As the record shows, Defendant was certified as a self-insurer by the Industrial Commission as of February 28, 1966. That certification has never been revoked by the Commission and Defendant has always properly filed its annual payroll report and paid its self-insurer's tax to the State Tax Commission. In addition, pursuant to the Industrial Commission's request, Defendant filed its financial statement with the Industrial Commission on September 12, 1968 and by letter received by Defendant from the Commission on September 19, 1968, the Commission acknowledged receipt of Defendant's annual report and stated that Defendant's privilege as a self-insurer was continuing uninterrutped. Thus, Defendant has been duly qualified as a self-insurer under the Workmen's Compensation Act ever since it applied for and received its initial certificate

from the Commission and, at least for the year 1968, which is the year in which Plaintiff sustained his industrial injury and filed his action in the lower court, Defendant has furnished its anual report to the Commission indicating satisfactory proof of financial ability to pay direct compensation.

The argument contained in Plaintiff's written brief filed herein takes out of context one sentence of a three paragraph section of the Workmen's Compensation Act and attempts to show that there has been technical noncompliance by the defendant of the particular provision in that sentence which provides for the filing of *annual* reports with the Commission. Defendant submits that the true meaning of that section can only properly be acertained by a reading of the Section as a whole and the extraction of one sentence from the statute tends to disguise the true intention of the legislature. Section 35-1-46, Utah Code Annotated, 1953 is set out in full as follows:

> "Employers except counties, cities, towns and school districts shall secure compensation to their employees in one of the following ways:
>
> (1) By insuring, and keeping insured, the payment of such compensation with the state insurance fund.
>
> (2) By insuring and keeping insured, the payment of such comepnsations with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state.

(3) By furnishing annually to the commission satisfactory proof of financial ability to pay direct compensation in the amount, in the manner and when due as provided for in this title. In such cases the commission may *in its discretion* require the deposit of acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred and *may* at any time change or modify its findings of fact herein provided for, if *in its judgment* such action is necessary or desirable to secure or assure a strict compliance with all the provisions of law relating to the payment of compensation and the furnishing of medical, nurse and hospital services, medicines and burial expenses to injured, and to the dependents of killed employees. The commission *may* in proper cases revoke any employer's privilege as a self-insurer.

The commission is hereby authorized and empowered to maintain a suit in any court of the state to enjoin any employer, within the provisions of this act, from further operation of the employer's business, where the employer has failed to insure or to keep insured in one of the three ways in this section provided, the payment of compensation to injured employees, and upon a showing of such failure to insure the court shall enjoin the further operation of such business until such time as such insurance has been obtained by the employer. The court may enjoin the employer without requiring bond from the commission.

If the commission has reason to believe that an employer of one or more employees is conducting a business without securing the payment of compensation in one of the three ways provided

> in this section, the *commission may give such employer five days written notice by registered mail* of such noncompliance and if the employer within said period does not remedy such default, the commission *may* file suit as in this section above provided and the court is empowered, ex parte to issue without bond a temporary injunction restraining the further operation of the employer's business." (emphasis added)

The wording in sub-paragraph (3) of the above quoted section indicates an intention to give the Commission discretion as to what proof of financial ability or what security it may require from those employers who elect to become self-insurers. The wording of the section indicates that the Commission should determine whether or not an employer has properly secured the payment compensation. In this connection, Defendant readily agrees with the rules of statutory construction set out in the case of *Spring Canyon Coal Company v. Industrial Commission of Utah,* 74 Utah 103, 277 P. 206 (1929) which Plaintiff relies upon in his brief. In that case, this court stated:

> "Among the other well recognized rules applied in the construction of a statute are these: The language used must be read in a sense which harmonizes with the general purpose and objects of the statute. . . ."

In applying this rule of statutory interpretation it would be consistent with the purpose of the Workmen's Com-

pensation Act for this court to hold that the Industrial Commission has the discretion to determine whether a company qualifies as a self-insurer under the Workmen's Compensation Act and to determine for itself the extent of the reports which it deems necessary to require from self-insurers so as to satisfy the Commission that the payment of compensation is properly secured. The Commission should certainly be allowed to rely upon its own records and upon the annual reports filed by self-insurers with the Tax Commission in making its judgments.

The provision in the Workmen's Comepnsation Act which Plaintiff attempts to rely upon in its attempt to circumvent the provisions of the Act is set out in full at Section 35-1-57, Utah Code Annotated, 1953 as follows:

> "Employers who shall fail to comply with the provisions of section 35-1-46 shall not be entitled to the benefits of this title *during the period of noncompliance,* but shall be liable in a civil action to their employees for damages suffered by reason of personal injuries arising out of or in the course of employment caused by the wrongful act, negelct or default of the employer or any of the employer's officers, agents or employees, and also to the dependents or personal representatives of such employees where death results from such injuries. In any such action the defendant shall not avail himself of any of the following defenses: The defense of the fellow-servant rule, the defense of assumption of risk, or the defense of contributory negligence. Proof of the injury shall constitute prima facie evidence of negligence on the

> part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in such injury. And such employers shall also be subject to the provision of the two sections next succeeding." (emphasis added)

This provision does not define the "period of noncompliance" nor does Section 35-1-46 of the Act indicate a date upon which annual reports should be filed or the particular period which such annual reports are intended to cover. Since Defendant did file its annual report in September 1968 it can only be assumed that such report would cover that year. Thus defendant was fully qualified and had fully complied with the statute during the year 1968 even to the extent of filing an annual report with the Commission and Plaintiff's civil court action must therefore fail.

The obvious intent of Section 35-1-57 of the Act is to allow an employee to maintain a civil action against his employer if the employer has neither qualified as a self-insurer nor secured insurance coverage with an independent company or the state insurance fund. This section does not provide that such court action can be maintained simply because the Commission does not insist upon the filing of reports on an annual basis. If this court were to adopt Plaintiff's contention that the mere failure of the Commission to require annual reports from self-insurers should have the effect of suspending or terminating an employer's status as a self-insurer, the

effect of such a ruling would obviously have drastic and unintended consequences not only for this Defendant but for all self-insurers in Utah. Since the Industrial Commission has not required the filing of annual reports for several years, Plaintiff's position would mean that no employer who has been deemed by himself and by the Commission as a self-insurer over the past several years has in fact been entitled to the benefits of the Workmen's Compensation Act and any employee having a presently outstanding industrial claim against such an employer for an injury sustained during the "period of noncompliance," whatever that term may mean, would now be allowed to bring a civil action against his employer and attempt to prove fault on the part of the employer. Such a result would be manifestly unfair and contrary to the obvious purposes of the Workmen's Compensation Act.

Plaintiff devotes a major portion of his written brief to the argument that the Workmen's Compensation Act was intended to give an employee security with respect to the collection of his damages due to an industrial injury and that the provisions of Section 35-1-57 are intended to grant security to an injured employee by allowing him a civil action when such security is not obtained by the employer's compliance with the provisions of Section 35-1-46. Defendant submits that if in fact an employer is financially incapable of making compensation payments as provided for in the Workmen's Com-

pensation Act, then certainly he is without sufficient resources to pay any judgment which an injured employee may obtain in a civil action brought against his employer pursuant to provisions of Section 35-1-57. Besides there is no evidence in this case that the Defendant is unable or even unwilling to pay the compensation. The true public policy and intended purpose behind the Workman's Compensation laws is explained at 58 Am. Jur., "Workmen's Compensation," § 2, which is cited in Plaintiff's brief. There it is pointed out that workman's compensation acts are intended to eliminate costly and burdensome litigation, prevent disharmony between the employer and employee and limit and make fixed the employer's liability for industrial injuries. Certainly the attempt by Plaintiff in bringing this civil action is in direct conflict with these stated purposes and Plaintiff should not be allowed to defeat these purposes.

Defendant notes that Plaintiff's brief cites no cases either from Utah or any other jurisdiction in which a court of law has supported his contention either in practice or in principle. Defendant's research has also revealed no such cases. This lack of authority is undoubtedly due to the lack of merit in the position which Plaintiff is taking in this case.

CONCLUSION

The facts in evidence show that Defendant has been duly qualified as a self-insurer under the Utah Workmen's Compensation Act since it was originally so certi-

fied by the Industrial Commission. It has always complied with all of the rules, regulations and practices of the Industrial Commission and it has always filed its annual reports and paid its annual self-insurers taxes to the State Tax Commission.

Section 35-1-46 of the Workmen's Compensation Act, when taken as a whole, gives the Industrial Commission the discretion to determine who qualifies as a self-insurer and the extent of records required to make that determination. But even if the failure of the Commission to call for annual reports would have the effect of suspending a self-insurer's qualifications under the Act, Section 35-1-57 of the Act only allows an employee to bring a civil court action against his employer "during the period of noncompliance" and since Defendant was in full compliance with the act for the year of 1968 by filing an annual report with the Commission on September 12, 1968, Plaintiff's court action is barred and the trial court properly granted Defendant's Motion for Summary Judgment.

Plaintiff's action in this case is simply an attempt to circumvent the legislative intent inherent in the Utah Workmen's Compensation Act by taking out of context a portion of the statute and arguing that technical noncompliance with that portion should allow the compensation provisions of the Act to be discarded. Defendant has acted in complete good faith in qualifying

itself as a self-insurer under the Act and it and other similar self-insurers should not be denied the benefits of the Act. Plaintiff has his remedy for his injury by accepting the compensation benefits provided in the Workmen's Compensation Act.

This Court should affirm the lower court's Summary Judgment.

Respectfully submitted,

WORSLEY, SNOW &
CHRISTENSEN
7th Floor, Continental Bank
Building
Salt Lake City, Utah
Attorneys for Defendant
and Respondent